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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

TASHA KENDRICK et al., Plaintiffs and Respondents, v. CONCORDE CAREER COLLEGES, INC., Defendant and Appellant.	B235922 (Los Angeles County Super. Ct. No. BC457097)

APPEAL from an order of the Los Angeles Superior Court. Jane L. Johnson, Judge. Reversed with directions.

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Duane Morris LLP, Keith Zakarin, and Edward M. Cramp for Defendant and Appellant.

Gallenberg PC, Rosa Vigil-Gallenberg; Tostrud Law Group, P.C., Jon A. Tostrud; Cuneo Gilbert & LaDuca, and Sandra Watson Cuneo for Plaintiffs and Respondents.

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Concorde Career Colleges, Inc. (Concorde) appeals from an order denying its motion to compel arbitration. We reverse.

BACKGROUND

The complaint alleges that Concorde is "a for-profit higher education institution providing educational programs for working adult students," with four campuses in California. Plaintiffs are three graduates of the "Insurance Coding and Billing Specialist" program at Concorde's North Hollywood campus. They filed suit against Concorde, alleging claims for breach of contract, negligent and intentional misrepresentation, deceptive advertising, unfair competition, violation of certain provisions of the Education Code, and unjust enrichment. Plaintiffs allege all of their claims on behalf of both themselves and a putative class of similarly situated persons, defined as "[a]ll persons who entered into enrollment contracts for the Insurance Coding and Billing Specialist degree with Defendant Concorde in California within the last four years from the filing of this complaint."

Concorde moved to compel arbitration and introduced copies of arbitration agreements that plaintiffs signed at the time of their enrollment in November 2007, March 2008, and July 2008, respectively. Under the agreements, each plaintiff agreed "that any dispute arising from my enrollment at Concorde Career Institute ('School'), no matter how described, pleaded or styled, shall be resolved by binding arbitration under the Federal Arbitration Act conducted by the American Arbitration Association ('AAA') at North Hollywood, California, under its Commercial Rules." The agreements further provided as follows: "Both Student and School irrevocably agree that any dispute between them shall be submitted to Arbitration"; "[n]either the Student nor the School shall file or maintain any lawsuit in any court against the other, and agree that any suit filed in violation of this Agreement shall be dismissed by the court in favor of an arbitration conducted pursuant to this Agreement"; "[t]he costs of the arbitration filing fee, arbitrator's compensation and facilities fees will be paid by the School, to the extent these fees are greater than a Superior Court filing fee"; and "[a]ny remedy available from a court under the law shall be available in the arbitration." In addition, the agreement

stated, "By my signature below, I acknowledge that I understand that both I and the School are irrevocably waiving rights to a trial by jury, and are selecting instead to submit any and all claims to the decision of an arbitrator instead of a court. I understand that the award of the arbitrator will be binding, and not merely advisory. [¶] I also acknowledge that I may at any time, before or after my admission, obtain a copy of the Rules of the American Arbitration Association, at no cost, from the Executive Campus Director."

Rule R-7 of the AAA's Commercial Rules provides that "[t]he arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement." In addition, the AAA's Supplementary Rules for Class Arbitration (Supplementary Rules) expressly provide that they "shall apply to any dispute arising out of an agreement that provides for arbitration pursuant to any of the rules of the [AAA] where a party submits a dispute to arbitration on behalf of or against a class or purported class, and shall supplement any other applicable AAA rules." Supplementary Rule 3 provides that "[u]pon appointment, the arbitrator shall determine as a threshold matter, in a reasoned, partial final award on the construction of the arbitration clause, whether the applicable arbitration clause permits the arbitration to proceed on behalf of or against a class."[1]

Plaintiffs opposed Concorde's petition to compel arbitration on the ground that the arbitration agreements are unenforceable because they violate public policy and are unconscionable.

Two days before the calendared hearing on Concorde's petition, the trial court entered a minute order directing the parties to reschedule the hearing for a later date and in the meantime to submit supplemental briefs on "the issue of the effect of the U.S. Supreme Court's decision in *Stolt-Niels[e]n v. Animalfeed International Corporation* (2010) 130 S.Ct. 1758" (hereafter *Stolt-Nielsen*) on Concorde's petition.

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[1] All references to the AAA's Commercial Rules and Supplementary Rules are to the versions of those rules that were in effect when plaintiffs executed the arbitration agreements.

The parties filed the requested supplemental briefs, and the court conducted the rescheduled hearing and then denied the petition without prejudice. The order denying the petition does not state the court's reasoning. The reporter's transcript of the hearing, however, reflects that the court concluded that, under *Stolt-Nielsen*, because the arbitration agreements did not expressly address class arbitration, the parties could not be compelled to submit their claims to class arbitration. Thus, because all of plaintiffs' claims were class claims and the arbitration agreement did not contain a class action waiver, all of plaintiffs' claims had to remain in court. The court denied the petition without prejudice because if plaintiffs did not succeed in obtaining class certification, then Concorde should retain the right to compel individual arbitration of plaintiffs' claims.

Concorde timely appealed.

STANDARD OF REVIEW

We review the trial court's conclusions of law de novo, and we review its findings of fact under the substantial evidence standard. (*Crocker National Bank v. City and County of San Francisco* (1989) 49 Cal.3d 881, 888.) Those same standards apply to an appeal from the denial of a motion to compel arbitration. For example, "[u]nconscionability findings are reviewed de novo if they are based on declarations that raise 'no meaningful factual disputes.' [Citation.] However, where an unconscionability determination 'is based upon the trial court's resolution of conflicts in the evidence, or on the factual inferences which may be drawn therefrom, we consider the evidence in the light most favorable to the court's determination and review those aspects of the determination for substantial evidence.' [Citation.]" (*Murphy v. Check 'N Go of California, Inc.* (2007) 156 Cal.App.4th 138, 144.)

DISCUSSION

I. Delegation of the Issue of Class Arbitration

Concorde argues that under the Supplementary Rules, an arbitrator rather than a court should determine whether the arbitration agreements allow the arbitration of plaintiffs' claims to proceed on behalf of a class. We agree.

The United States Supreme Court has held that "[t]he question whether the parties have submitted a particular dispute to arbitration, i.e., the 'question of arbitrability,' is 'an issue for judicial determination [u]nless the parties clearly and unmistakably provide otherwise.'" (*Howsam v. Dean Witter Reynolds, Inc.* (2002) 537 U.S. 79, 83; see also *Greenspan v. LADT, LLC* (2010) 185 Cal.App.4th 1413, 1440 (*Greenspan*).) When "'parties explicitly incorporate rules that empower an arbitrator to decide issues of arbitrability, the incorporation serves as clear and unmistakable evidence of the parties' intent to delegate such issues to an arbitrator.'" (*Greenspan, supra*, 185 Cal.App.4th at p. 1442, quoting *Contec Corp. v. Remote Solution, Co., Ltd.* (2d Cir. 2005) 398 F.3d 205, 208.)

The arbitration agreements in this case expressly incorporate the AAA's Commercial Rules. The Supplementary Rules expressly provide that they "shall apply to any dispute arising out of an agreement that provides for arbitration pursuant to any of the rules of the [AAA] where a party submits a dispute to arbitration on behalf of or against a class or purported class, and shall supplement any other applicable AAA rules." The parties' arbitration agreements therefore incorporate the Supplementary Rules. No party argues to the contrary.

The AAA's Commercial Rules and Supplementary Rules delegate to the arbitrator various issues that could plausibly be described as issues of "arbitrability." First, Rule R-7 of the Commercial Rules delegates issues of "jurisdiction," including the existence and validity of the arbitration agreement. Second, under Rule 3 of the Supplementary Rules, an arbitrator rather than a court shall make the threshold determination of whether the arbitration agreements allow the arbitration of plaintiffs' claims to proceed on behalf of a class.

Because the trial court's order denying Concorde's petition to compel arbitration was based on the court's determination that the arbitration could not proceed on behalf of a class, the trial court erred.[2] The parties' agreements clearly and unmistakably delegate that issue to the arbitrator.

Apart from issues of unconscionability and waiver, plaintiffs' only argument against this conclusion is that the Supplementary Rules do not clearly and unmistakably delegate the issue to the arbitrator, because Supplementary Rule 1(c) provides that "[w]henever a court has, by order, addressed and resolved any matter that would otherwise be decided by an arbitrator under these Supplementary Rules, the arbitrator shall follow the order of the court." We are not persuaded. Supplementary Rule 1(c) merely tells the arbitrator what to do if a court order resolves an issue that, under the Supplementary Rules, should have been resolved by the arbitrator. Under those circumstances, the arbitrator must abide by the court order. Supplementary Rule 1(c) says nothing about which issues are to be resolved by an arbitrator and which by a court. It consequently does not undermine Supplementary Rule 3's clear and unmistakable delegation to the arbitrator of the issue of whether the arbitration may proceed on behalf of a class.

We conclude that because the trial court determined whether the arbitration of plaintiffs' claims may proceed on behalf of a class, the trial court erred. We must therefore reverse the trial court's order unless there is an alternative basis for affirmance.

II. Other Possible Grounds for Affirmance

A. The Trial Court's Reasoning

The reporter's transcript reflects that the trial court believed its denial of Concorde's petition to compel arbitration was required by the United States Supreme Court's decision in *Stolt-Nielsen*. But *Stolt-Nielsen* says nothing about whether or when a court rather than an arbitrator should determine whether the parties' agreement allows

[2] Again, the trial court's order does not expressly determine the issue, but the reporter's transcript reflects that the court's denial of Concorde's petition was based on the court's conclusion that the arbitration could not proceed on behalf of a class.

the arbitration to proceed on behalf of a class.[3] *Stolt-Nielsen* thus provides no support for the trial court's decision to determine that issue rather than leaving it for the arbitrator, as provided by Supplementary Rule 3.

B. Unconscionability

Plaintiffs argue that we should affirm the trial court's order on the ground that the arbitration agreements are unenforceable because they violate public policy and are unconscionable.[4] We disagree.

First, plaintiffs argue that the arbitration agreements violate public policy because they "limit[] the remedies [p]laintiffs can seek in a court of law." As support for that argument, plaintiffs contend that their claims for injunctive relief under Business and Professions Code section 17200 (section 17200) are not arbitrable, citing *Cruz v. PacifiCare Health Systems, Inc.* (2003) 30 Cal.4th 303, 315-316 (*Cruz*).) We are not persuaded. The arbitration agreements expressly provide that "[a]ny remedy available from a court under the law shall be available in the arbitration," so plaintiffs' point about limitation of remedies is not well taken. As for *Cruz*'s holding that certain claims for injunctive relief under section 17200 are not arbitrable, it is presently unclear whether that holding is still valid after *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. __, 131 S.Ct. 1740. (See *Nelsen v. Legacy Partners Residential, Inc.* (2012) 207 Cal.App.4th 1115, 1135.) We need not decide the issue, however, because even if that injunctive relief claim is not arbitrable, the trial court should have severed and stayed it and compelled arbitration of the arbitrable claims. (See *Cruz*, *supra*, 30 Cal.4th at p. 320.)

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[3] In *Stolt-Nielsen*, an arbitration panel determined that the parties' agreement allowed the arbitration to proceed on behalf of a class. (*Stolt-Nielsen*, *supra*, 130 S.Ct. at p. 1766.) The Supreme Court never held, stated, or implied that the arbitration panel should not have determined that issue. On the contrary, the Court stated that the arbitrators were authorized to determine the issue under Supplementary Rule 3, which was incorporated in the parties' agreements. (*Id.* at p. 1765.)

[4] Plaintiffs also argue that they did not "meaningful[ly]" consent, or did not consent "in a real sense[,]" to certain provisions of the arbitration agreements, but the authorities plaintiffs rely on are all unconscionability cases. We consequently interpret plaintiffs' "meaningful consent" arguments as unconscionabality arguments.

For all of these reasons, the putative nonarbitrability of the claim for injunctive relief under section 17200 does not render the arbitration agreements unenforceable as against public policy.

Second, plaintiffs argue that the arbitration agreements violate public policy by forcing plaintiffs to pay excessive fees. In support of that argument, plaintiffs cite certain no-longer-functioning links on the AAA's website, and plaintiffs contend that the agreements will require them to pay "filing fees in advance that are 25.5 times greater than those charged by a court of law." (Bold and italics omitted.) We are not persuaded. The agreements expressly state that "[t]he costs of the arbitration filing fee, arbitrator's compensation and facilities fees will be paid by [Concorde], to the extent these fees are greater than a Superior Court filing fee." On that basis, Concorde concedes that it is contractually required to pay any "arbitration fees" that exceed a superior court filing fee. We agree with Concorde's interpretation, and Concorde will now be estopped from denying that it must pay such fees. Concorde's contractual commitment to pay all arbitration fees that exceed a superior court filing fee does not violate public policy.

Third, plaintiffs argue that the agreements are both procedurally and substantively unconscionable. Again, we are not persuaded.

"'The prevailing view is that [procedural and substantive unconscionability] must both be present in order for a court to exercise its discretion to refuse to enforce a contract or clause under the doctrine of unconscionability.' [Citation.] But they need not be present in the same degree. 'Essentially a sliding scale is invoked which disregards the regularity of the procedural process of the contract formation, that creates the terms, in proportion to the greater harshness or unreasonableness of the substantive terms themselves.' [Citations.] In other words, the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa." (*Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 114, italics omitted (*Armendariz*).)

Assuming for the sake of argument that the arbitration agreements are procedurally unconscionable, we nonetheless conclude that they are not substantively

unconscionable. Plaintiffs argue that the agreements are substantively unconscionable because they require plaintiffs to pay excessive fees and because plaintiffs' claim for injunctive relief under section 17200 is not arbitrable. We have already discussed those arguments. For the reasons given, neither point shows that the arbitration agreements are unreasonably harsh, one-sided, or oppressive. (*Armendariz, supra*, 24 Cal.4th at p. 114.)

Plaintiffs also argue that the agreements are substantively unconscionable because they do not guarantee plaintiffs "a minimum amount of discovery which is guaranteed to [p]laintiffs[] in a court of law." Plaintiffs cite only one case in support of the argument, however, and that case involved a rule that strictly limited discovery to "the sworn deposition statements of two individuals and any expert witnesses expected to testify at the arbitration hearing[,]" in addition to an exchange of "all exhibits and a list of potential witnesses[.]" (*Fitz v. NCR Corp.* (2004) 118 Cal.App.4th 702, 716.) Moreover, "[n]o other discovery [was] allowed unless the arbitrator [found] a compelling need to allow it." (*Ibid.*) The arbitration agreements in this case impose no comparable limitations. Rather, under the AAA's Commercial Rules, the arbitrator has broad discretion to "direct . . . the production of documents and other information[.]" Because plaintiffs have cited no authority supporting their contention that discovery provisions like those contained in the Commercial Rules are substantively unconscionable, and because the Commercial Rules grant the arbitrator broad discretion to allow whatever discovery might be necessary, we reject plaintiffs' argument.

Finally, plaintiffs appear to argue that the arbitration agreements are substantively unconscionable because "'arbitration is poorly suited to the higher stakes of class litigation'" and because Concord is "a repeat participant in the arbitration process." We are aware of no authority for the proposition that the involvement of a "repeat participant" itself renders an arbitration agreement substantively unconscionable, or that an agreement for class arbitration is inherently substantively unconscionable, or that an agreement for class arbitration with a "repeat participant" is substantively unconscionable. The cases cited by plaintiffs do not support their position. *ACORN v. Household Intern., Inc.* (N.D.Cal. 2002) 211 F.Supp.2d 1160, 1172, says only

that a provision *making all awards secret* would serve to conceal, and hence to shield from reform, any advantages that repeat participants might hold. *Ting v. AT&T* (9th Cir. 2003) 319 F.3d 1126, 1151-1152, is similar. The arbitration agreements in this case do not contain any such secrecy provisions. And the final case cited by plaintiffs on this point, *AT&T Mobility LLC v. Concepcion, supra*, does not hold that an agreement to class arbitration is inherently substantively unconscionable.

For all of the foregoing reasons, we conclude that plaintiffs have failed to show that the arbitration agreements are unenforceable because they violate public policy or are unconscionable. Finding no alternative basis to affirm the trial court's order, we must reverse.

C. Waiver

Finally, plaintiffs argue on several grounds that Concorde is precluded from contending on appeal that an arbitrator rather than a court should determine whether the arbitration agreements allow the arbitration of plaintiffs' claims to proceed on behalf of a class. We are not persuaded.

First, plaintiffs argue that Concorde is estopped to raise the issue on appeal because at the hearing on the petition Concorde expressly conceded that the court had authority to decide "arbitrability." Under the doctrine of invited error, "'[w]here a party by his conduct induces the commission of error, he is estopped from asserting it as a ground for reversal' on appeal. [Citation.]" (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 403.)

In their papers filed in support of and in opposition to the petition to compel arbitration, the parties did not address the issue of whether the court or the arbitrator should decide questions of "arbitrability." At the hearing on the petition, however, the court stated, "Now, I've seen arbitration provisions that provide that it is the arbitrator who gets to decide the issue of arbitrability. This does not say that." Concorde's counsel responded, "That is correct, your honor." The court added, "Right. It does not." Concorde's counsel again agreed, "You're right, your honor." Shortly thereafter, the

court asked, "And don't I get to decide the issue of arbitrability?" Concorde's counsel answered, "Yes, your honor[.]"

In those exchanges with the trial court, Concorde's counsel expressly induced the court to believe that the court was authorized to decide "the issue of arbitrability." Therefore, insofar as that belief was erroneous, Concorde induced the commission of the error and is consequently estopped from asserting it as a ground for reversal on appeal.

We also conclude, however, that counsel's concession that the court should decide "the issue of arbitrability" did not unambiguously constitute a concession that the court, rather than the arbitrator, should determine the issue covered by Supplementary Rule 3, namely, whether the arbitration agreements permit the arbitration to proceed on behalf of a class. Rather, counsel appears to have conceded only that the court could determine the existence and validity of the arbitration agreement (which, contrary to counsel's concession, would have been for the arbitrator to decide under Rule R-7 of the AAA's Commercial Rules). Concorde is therefore not estopped from arguing on appeal that an arbitrator, not a court, should determine whether the arbitration agreements permit the arbitration to proceed on behalf of a class.

Second, plaintiffs argue that "issues raised for the first time on appeal which were not litigated in the trial court are waived." But the waiver doctrines that plaintiffs cite are not absolute. Rather, their application is discretionary if the issue presented is a pure question of law based on undisputed facts. (See, e.g., *Tsemetzin v. Coast Federal Savings & Loan Assn.* (1997) 57 Cal.App.4th 1334, 1341, fn.6.) The issue of whether, under the parties' arbitration agreements and incorporated rules, an arbitrator rather than a court should determine whether the agreements allow the arbitration to proceed on behalf of a class is a pure question of law based on undisputed facts. We exercise our discretion to decide the issue even though it was not litigated in the trial court.

III. Proceedings on Remand

On remand, the trial court must grant Concorde's petition to compel arbitration. We do not hold that the arbitration agreements between plaintiffs and Concorde permit the arbitration to proceed on behalf of a class, and we do not hold that they do *not* permit it. That determination must be made in the first instance by an arbitrator under Supplementary Rule 3.

DISPOSITION

The order is reversed, and the superior court is directed to enter a new and different order granting Concorde's petition to compel arbitration; the court may, in its discretion, sever and stay any nonarbitrable claims. Appellant shall recover its costs on appeal.

NOT TO BE PUBLISHED.

ROTHSCHILD, J.

We concur:

MALLANO, P. J.

CHANEY, J.